



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC CIVIL SUIT NO. 313 OF 2011

BETWEEN

JOSEPH MUTUA KINAMA (*Suing as the administrators of the Estate of Syokau Kimana*) .

.....**PLAINTIFF**

VERSUS

SHANGILIA MAMA NA BABA.....**1ST**

DEFENDANT

MUTUKU KINAMA**2ND**

DEFENDANT

AND

CHARLES OWITI AGUTU.....**1ST**

INTERESTED PARTY

ROSEMARY ATIENO TOLO.....**2ND**

INTERESTED PARTY

RULING

1. The current motion subject to this ruling, dated 5/12/2023, is stated to have been filed in accordance with provisions of **Sections 1A** and **1B**, and **3A** of the **Civil Procedure Act**, as well as **Orders 1 Rule 10**, **8 Rule 51**, and **17 Rule 2(6)** of the **Civil Procedure Rules**. The plaintiff seeks the following reliefs from this court: -

a. Spent.

b. This honourable court be pleased to reinstate this matter.

c. This honourable court be pleased to allow the plaintiff to substitute and add parties in this matter.

d. This court be a pleased to allow the plaintiff to amend the plaint dated 1/11/2011 as per the annexed amended plaint.

e. The amended plaint be filed and served within such period as the court deems fit.

f. This honourable court be pleased to award any other relief the court deems fit and just to grant.

g. Costs follow the cause.

2. The motion is supported by the grounds contained therein, as well as the affidavit sworn on the same date by Rose Mwikali Mutie Mutinda, an administrator of the deceased plaintiff. A

summary of the grounds in support of the motion includes, among others: a) the suit was previously filed by her brother, Joseph Mutua Kinama, as the administrator of the deceased plaintiff, but unfortunately he died on 22/02/2013, which compelled her to obtain a limited grant over the deceased plaintiff's estate; b) that since the deceased plaintiff's family were not privy to the suit, it was dismissed for want of prosecution on 22/02/2018; and finally, c) that in view of the dismissal, a suit she filed in **ELC Petition No. 009 of 2022** was deemed an abuse of the court process.

3. The interested parties oppose this motion through their grounds of opposition, dated 5/02/2024, which stated: -

a. The motion is improperly before the court.

b. The motion is incurably defective in law since it does not disclose the reasons for the delay as required by law.

c. There is no sufficient cause to warrant the setting aside of the ex parte decision.

d. Allowing the motion will prejudice the respondents.

e. The motion is an abuse of the court process, frivolous, vexatious and merely intended to drag the respondents to unnecessary litigation.

f. It is just, meet and in the interests of fairness and justice that the motion dated 5/12/2023 be dismissed with costs to the respondents.

4. As directed by the court, the motion was canvassed through written submissions filed by the law firms of **Mss. Makau Mutua Advocates** for the plaintiff, dated 28/02/2025, and **Orondo Tuli & Co. Advocates** for the interested parties, dated 13/06/2025, and the court is grateful to the counsels for the well-argued arguments.
5. Now, turning to the substance of the matter at hand and having carefully considered the motion, its grounds, affidavit, grounds of opposition and articulate submissions, two issues have emerged for determination: a) **whether the deceased plaintiff has met the legal threshold to warrant the revival and/or reinstatement of the suit**, and b) **whether leave should be granted to the deceased plaintiff to amend the plaint**. In determining these issues together, this court will examine the relevant provisions of law that permit it to entertain the motion.
6. Regarding the law, and jurisprudence on the first issue, **Order 24 Rule 7(2)** of the **Civil Procedure Rules** allows the person claiming to be the legal representative of a deceased plaintiff,

or the trustee or official receiver in the case of a bankrupt plaintiff, to apply for an order to revive a suit that has abated or to set aside an order of dismissal. If it is proven that any sufficient cause prevented her from continuing the suit, the court shall revive the suit or set aside such dismissal on such terms as to costs or otherwise as it deems fit. As for jurisprudence, this court adopts the *dicta* in the Court of Appeal decision in **Peter Mbiri Michuki v Samuel Mugo Michuki [2014] KECA 342 (KLR)** that stated as follows on the reinstatement/revival of a suit, thus:-

“A revival order operates as an order reinstating the suit. It not only revives the suit from the date its filing but revives all proceedings, rulings and orders made in the matter.”

7. Now, in addressing this issue of determination, it is essential to highlight the applicable law, the prevailing jurisprudence, and establish whether the deceased plaintiff’s legal representative has satisfied the legal threshold. To begin with, and as pointed out by the interested parties’ counsel, the relevant provision of law is found in **Order 24 Rule 3** of the **Civil Procedure Rules (CPR)**, which states: -

“(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue

to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.”

8. In juxtaposing these provisions of the law to the reliefs being sought in the motion, it is clear that though Rose Mwikali Mutie Mutinda is the deceased's legal representative, having been so appointed on 6/11/2023 by a limited grant issued by the High Court in Machakos and has the capacity to bring the motion and has availed reasons of the delay, as anticipated by **Order 24, Rule 7** of the **CPR**, however, she failed to seek an extension of time as required by **Order 24, Rule 3** of the **CPR**.

9. Therefore, this court finds the motion is incompetent. When faced with similar circumstances as the case herein, where a party failed to observe **Order 24 Rule 3** of the **CPR**, which decision this court associates with, the Court of Appeal in **Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others [2017] KECA 544 (KLR)** held as follows: -

“...it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff’s legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has

been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted. The learned Judge, supported by the authority of Joseph Gachuhi Muthanji (supra) was therefore right in dealing with that aspect of the application in the manner he did.”

10. Significantly, even if the motion had met the legal threshold of **Order 24** of the **CPR**, this court, exercising its judicious discretion, would have been guided by **Shah v Mbogo and Another [1967] EA 116, Limited [2020] eKLR**, which outlined the guiding principles as follows: -

“This discretion (to set aside ex parte Court decisions) is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or

otherwise, to obstruct or delay the course of justice.”

11. This criterion is also restated in the long-cited decision of **Ivita v Kyumbu [1975] KEHC 4 (KLR)**, whereby in this case, the court held that the tests to be applied are whether the delay is prolonged and inexcusable, and if it is, whether justice can still be done despite such delay. In applying these settled principles, this court would have declined to exercise judicious discretion in favour of the plaintiff’s representative for several reasons. This matter was filed in court in the year 2011, which was 14 years ago-a lengthy period-and the suit would cause significant difficulty, injustice, and prejudice to the defendants and interested parties.

12. Additionally, from the record, the deceased plaintiff was represented by counsel, and on 15/10/2014, the court permitted her counsel to substitute her, which the counsel did not do. The record of 23/02/2018 indicates that the deceased’s legal representative failed to instruct her counsel, Mr. Ndulu, thus preventing him from acting further. Moreover, as evident from the plaint, the suit was brought on behalf of the beneficiaries of the estate of the deceased plaintiff, which, in this court’s view, clearly includes Rose Mwikali Mutie Mutinda, and she cannot disassociate herself from her involvement in

this suit from its inception. Suffice it to say, she sat on her laurels and has no one to blame but herself.

13. Guided by established precedents and our constitutional principles, it is essential in the interests of justice that trials are concluded with reasonable expedition. Had this court not found the motion incompetent, it would have concluded that the deceased plaintiff's representative had not provided sufficient and justifiable reasons to justify exercising discretion in her favour and would have dismissed the motion.

14. Ultimately, guided by the law and judicial precedents, this court need not say more and hereby strikes out the notice of motion dated 5/12/2023 with no order as to costs. This file is hereby effectively marked as closed.

Delivered and Dated at Machakos this 18th day of November, 2025.

**HON. A. Y. KOROSS
JUDGE
18.11.2025**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms. Kanja Court Assistant.

Mr. Orondo Tuli for Interested Parties.

Miss. Mwiti for 2nd Defendant.

Ms. Irungu for Interested Party.

ORIGINAL